

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JUN 7 - 1937

X *James J. Laughlin* *James J. Laughlin*
No. 6934

**In the United States Court of Appeals for
the District of Columbia**

APRIL TERM, 1937

JAMES J. LAUGHLIN, APPELLANT

v.

UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

LESLIE C. GARNETT,
United States Attorney,
JOHN W. FIDELLY,
Assistant United States Attorney,
Attorneys for Appellee.

James J. Laughlin
James J. Laughlin

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**In the United States Court of Appeals
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No. 6934

JAMES J. LAUGHLIN, APPELLANT

v.

UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from a conviction and sentence on charges of *forgery, uttering, and larceny after trust*.

The charges all arose from *the same transaction* and all related to the misappropriation by appellant of approximately fifteen hundred dollars which had been turned over to him as attorney by one Walter C. Johnsen, a prisoner in the District Jail, in order to effect the release of said Johnsen and a codefendant on bail. The appellant was also representing as attorney certain codefendants who had been arrested with Johnsen, namely, Johnsen's wife who was also known as Erma Miller, and Edward Dietrich.

The larceny after trust count was in the usual form and charged appellant with the unlawful conversion and misappropriation in June 1936, of

the sum of approximately fifteen hundred dollars, the property of Walter C. Johnsen.

The forgery count charged that appellant in June 1936 with *intent to defraud*, forged and altered the body of a paper containing the genuine signature of one Erma Miller, so that the paper as altered and forged read in pencil writing as follows:

JUNE 29, 1936.

Received of James J. Laughlin One thousand four hundred and ninety two dollars and fifty cents (\$1,492.50) account Walter C. Johnsen.

ERMA MILLER.

The uttering count on which appellant was convicted, charged that with *intent to defraud* he did pass and utter the *identical forged receipt* to one Harry L. Underwood, an Assistant United States Attorney.

The government's case in brief was that appellant unlawfully misappropriated and converted to his own use the money given him by his client Johnsen for bail purposes, and that to cover up and hide his unlawful acts he prepared the forged receipt contending that he had given the money mentioned therein to Johnsen's wife, Erma Miller. When complaint was made to the United States Attorney by Johnsen, and appellant was called on to give an explanation and accounting, he then produced and gave to Assistant United States Attorney Harry L. Underwood the forged receipt

claiming that on the date mentioned therein he had given the money stated therein to Erma Miller.

THE EVIDENCE

As appellant's brief contains but a meager statement of the facts and evidence, and the record is a typewritten one, the appellee feels that it is not only necessary for a proper disposition of the case but also that it will be helpful to the Court to set forth at some length the evidence as shown by the record.

Walter C. Johnsen, Erma Miller, and Edward Dietrich were arrested in May 1936, and taken to the District Jail to await presentation of their case to the Grand Jury. While awaiting indictment and while as the record shows they already had an attorney, on or about June 10, the appellant called on them at the Jail and talked over with them their case and the matter of possible bail (Bill of Exceptions, page 1).

Johnsen told appellant that he was expecting a check for seven hundred and sixteen dollars, drawn on his account in a Chicago bank, and agreed to give appellant ten dollars if he would get his wife out on a cash bail. Five hundred dollars of the aforementioned check was to be put up as a cash bond for his wife, Erma Miller, and the balance of the check was to be given to her. It was further agreed that the cash bond was to be put up in her name (Bill of Exceptions, Pages 1 and 3).

About June 16, 1936, appellant informed Johnsen that he had received the seven hundred and

sixteen dollars and had effected the release of Erma Miller on a five hundred dollar cash bail, and had carried out all his prior instructions relative thereto (Bill of Exceptions, page 2).

Appellant at this time stated to Johnsen that he could effect the release of Johnsen and his codefendant Dietrich on one thousand dollar bail in each of their cases. As Dietrich had approximately five hundred dollars, appellant requested Johnsen to send to Chicago and draw fifteen hundred dollars more from his account there so that both might make bail. (Bill of Exceptions, pages 2 and 3).

The fifteen hundred dollars was sent for and a check in that amount arrived and was endorsed by Johnsen and given to appellant and cashed by him on June 20, 1936. Appellant rented a safe deposit box in the Second National Bank, Washington, D. C., in his, appellant's name and placed the fifteen hundred dollars in cash there (Bill of Exceptions, page 3).

Appellant later informed Johnsen that it would be necessary to have five hundred dollars additional money in order to get Johnsen and Dietrich out on bail and Johnsen, accordingly, sent for his entire balance in a Florida bank, this consisted of between seven and eight hundred dollars.

A check in the sum of seven hundred eighty-three dollars and thirty-six cents arrived about the middle of July, 1936, and was endorsed by Johnsen and turned over to appellant, who stated to Johnsen that he likewise had put this money in the safe-

deposit box. This particular check was dated July 17, and was cashed July 19, 1936 (Bill of Exceptions, page 4).

In subsequent visits to the jail appellant stated that he had been unable to arrange for the release of Johnsen and Dietrich on bail, and on numerous occasions *Johnsen requested that appellant bring to him at the jail the money which was in the safe deposit box. On each of these occasions appellant promised to bring the money as requested* (Bill of Exceptions, page 4).

Johnsen stated he never received any of the money nor did he authorize the appellant to give it to anyone.

Not having received the money, Johnsen made written complaints in August 1936 to the Court and to the United States Attorney.

Johnsen also stated that he had never retained appellant to represent him or his associates, other than to effect their release on bond (Bill of Exceptions, page 6). In this connection Johnsen denied having agreed to pay appellant fifteen hundred dollars or any such sum to represent himself, Erma Miller, and Dietrich, in the preparation for trial or actual trial of their pending cases.

Dietrich was present at practically all of the conferences had between Johnsen and appellant and corroborated the testimony of Johnsen.

Erma Miller was released on five hundred dollar cash bail on June 15, 1936, and stated that after her release and on the same date, at the Tower

Drug Store in this city, appellant gave her one hundred eighty three dollars and she signed and gave him a receipt for this amount, said receipt being in ink and on yellow paper.

She denied that she had ever signed Government 19, which was a receipt in pencil for one hundred eighty eight dollars, dated June 15, 1936 (Bill of Exceptions, 29).

She said she saw appellant after her release on bail at her room every day except Sunday until she left Washington on June 30, 1936 (Bill of Exceptions, page 30).

After her release, appellant assisted her in getting six hundred and twelve dollars and seventy three cents, from an account she had in Chicago and after she received the money she went alone to the American Express Company on June 29, 1936, and obtained six one hundred dollar Express Checks (Bill of Exceptions, page 30). She took these checks with her when she left Washington and drove alone to Louisville, Kentucky, and put them in a safe deposit box she rented there. No other sums were put in this box and five of the checks were cashed in Louisville, and the last one later on in Washington, D. C. (Bill of Exceptions, page 30).

Erma Miller stated that she remained in Louisville until July 26, 1936, and then went to Chicago, Illinois. She stated that from both places *she had written the appellant approximately seventeen letters, some in pencil and some in ink, and she stated*

that some were on her own stationery and some on her mother's and sister's and, in fact, on any she could pick up (Bill of Exceptions, page 31). She identified Government Exhibits 20, 21, 23, 27 and 28, as some of the letters which she had sent appellant.

Erma Miller denied signing the forged receipt, Government 18, though she admitted that the signature thereon was hers. She stated that she never saw the Exhibit until it was shown to her in Mr. Garnett's office in September 1936 (Bill of Exceptions, page 31). She likewise denied receiving the amount stated in the receipt (Bill of Exceptions, page 32).

District Attorney, Leslie C. Garnett, testified that he received a written complaint from Johnsen in August 1936, and that at ten A. M. on Friday, August 28, appellant came to his office and was told of the charges made by Johnsen. Appellant replied that a like complaint had been made had reached the Grievance Committee of the Bar Association, and *appellant at that time gave to Mr. Garnett a copy of his reply to the Grievance Committee relative to the identical charges.* This letter was marked Government Exhibit No. 30, and is set forth in the Bill of Exceptions at page 25. When Mr. Garnett asked appellant if he had the fifteen hundred dollar receipt referred to in his letter to the Grievance Committee, appellant replied that he did not have it with him, but that he could obtain it by noon, at which time appellant

was informed Mr. Garnett was leaving the city. Mr. Garnett stayed until one o'clock, and appellant not having returned, left his office and subsequently the city on a pending trip (Bill of Exceptions, pages 35-6).

Assistant United States Attorney, Harry L. Underwood, testified he was present on August 28, 1936, when appellant visited Mr. Garnett's office and corroborated Mr. Garnett's version of what occurred at that time and place. He testified further in detail as to what occurred and stated that appellant informed himself and Mr. Garnett that in handling Johnsen's case he had received the proceeds of three checks; that of the first check for \$716.00 he had furnished \$500.00 cash bail for Erma Miller and that *the balance, less certain expenses, had been delivered to her and he had her receipt for same.* Appellant further stated that he later received the proceeds of the fifteen hundred dollar check from Chicago which he placed in a safe deposit box at the Second National Bank, *and that when he subsequently delivered this money to Erma Miller that he took her receipt for it.* Appellant further contended that he had agreed to represent Johnsen, Erma Miller, Edward Dietrich, and another co-defendant named Willie Lee for fifteen hundred dollars.

Mr. Underwood stated that after Mr. Garnett had left the office on August 28th appellant returned at about two P. M. and said he

had been unable to locate the receipt for the fifteen hundred dollars, but was confident he could obtain it the following morning (Bill of Exceptions, pages 19 and 20). Mr. Underwood testified that appellant further stated that he had deposited the fifteen hundred dollars in the safe deposit box *so that he might look around and locate Erma Miller* and that the money was eventually paid to her at the Second National Bank on Seventh Street. Appellant stated that the receipt for fifteen hundred dollars *was in either pencil or ink and appellant thought that it was in ink because he carried his fountain pen. The paper used, appellant stated, was yellow paper, such as lawyers use for scratch pads* (Bill of Exceptions, pages 20 and 21).

Appellant further stated that the fifteen hundred dollars was paid to Erma Miller within from a week to two weeks before she left town.

Mr. Underwood said that on Saturday morning, August 29, 1936, appellant came to his office but stated that he had been unable to locate the receipts and that he would make an exhaustive search over the week end and that he was sure he could locate them by the following Monday morning. He further stated that on the following Monday morning, while he was Acting District Attorney, appellant came to his office at about 10:00 A. M. and stated *that he had those receipts and exhibited, among others, a receipt for \$1,492.00, Govt. Ex. 18 purporting to bear the signature of Erma Mil-*

ler; that appellant further had with him certain letters which he stated he had received from Erma Miller and likewise an additional receipt for the balance of the \$716.00 check which had been delivered to Erma Miller Govt. Ex. 19 (Bill of Exceptions, page 21). Mr. Underwood stated that appellant at this time offered him *photostats of these documents*, saying that he desired to keep the originals because of possible civil litigation relative to this matter (Bill of Exceptions, page 22).

On the request of Assistant United States Attorney, Fihelly, who was also present, the originals as well as the photostats were left with Mr. Underwood by appellant.

Mr. Underwood identified as among the documents delivered to him by appellant the following:

Government Exhibit No. 18, a receipt in *pencil writing* to appellant, dated June 29, 1936, for the sum of \$1,492.50, signed by Erma Miller.

Government Exhibit No. 19, a receipt in *pencil writing* purportedly signed by Erma Miller, dated June 15, 1936, for \$188.00.

Government Exhibit No. 20, an undated letter signed by Erma Miller from Louisville, Kentucky, directed to appellant.

Government Exhibit No. 21, a letter dated July 27, 1936, from Erma Johnsen at Chicago, Illinois, to appellant.

Government Exhibit No. 22, a receipt dated June 20, 1936, signed by appellant for the sum of \$50.00.

Government Exhibit No. 23, a letter dated July 10th or 18th from Erma Miller at Louisville, Kentucky, to appellant.

Government Exhibit No. 24 A & B, *two photostatic copies of Government Exhibit No. 19.*

Government Exhibit 25 A & B were two photostatic copies of Government Exhibit No. 20.

Government Exhibit 26 A & B were two photostatic copies of Government Exhibit No. 28.

Government Exhibit No. 27, a letter dated July 22, 1936, from Erma Miller at Louisville, Kentucky, to appellant.

Government Exhibit No. 28, a letter dated July 15, 1936, from Erma Miller at Louisville, Kentucky, to appellant (Bill of Exceptions, page 22).

With respect to Government Exhibits Nos. 18 and 19, which together with Government Exhibit No. 20, the undated letter from Louisville, Kentucky, signed by Erma Miller to appellant, are the three most important documents in the Government's case, but appellant's Bill of Exceptions at page 23 shows as follows:

Government Exhibit No. 18, the lettter of—

JUNE 29, 1936.

Received of James J. Laughlin One thousand four hundred and ninety two dollars and fifty cents (\$1,492.50) account Walter C. Johnsen.

ERMA MILLER.

Government Exhibit No. 18, was in *pencil writing* and was a piece of white paper which had been cut from what was apparently *writing stationery*.

Government Exhibit No. 19, read:

JUNE 15, 1936.

Received of James J. Laughlin \$188.00,
balance of check of \$716.00 minus expenses.

ERMA MILLER.

This exhibit was in *pencil writing* on *white, thin onion skin paper*.

John R. Fitzpatrick, Assistant Cashier of the Second National Bank, produced, in response to a subpoena duces tecum, certain bank records relative to the case, and among these was a check in the sum of \$716.00 dated June 15, 1936, a check in the sum of \$1,500.00 dated June 19, 1936, and one in the sum of approximately \$785.00 dated July 17, 1936. These checks were introduced in evidence as Government Exhibits Nos. 11, 12, and 13, respectively. Mr. Fitzpatrick stated that he was present on June 20, 1936, when appellant cashed the \$1,500.00 check and that appellant stated to him that the money belonged to Johnsen and that he desired to rent a safety deposit box in which to keep same. Appellant then went with Mr. Fitzpatrick to the safe deposit department of the bank where a box was rented by appellant in his name as attorney. The signature card was introduced in evidence as Government Exhibit No. 14 (Bill of Exceptions, page 17).

Mr. Fitzpatrick also produced 14 visiting slips signed by appellant in order to obtain entry to the safe deposit box which was rented. These exhibits were introduced in evidence as Government Exhibit No. 15, A to N, inclusive.

Government Exhibit No. 15 A, was a visiting slip signed by appellant dated June 26, 1936, at 11:20 A. M.

Government Exhibit No. 15 B, was a visiting slip signed by appellant dated June 29, 1936, at 1:50 P. M.

Government Exhibit No. 15 C, was a visiting slip dated July 3, 1936, at 12:15 P. M.

Government Exhibit No. 15 D, was a visiting slip dated July 10, 1936, at 12:40 P. M.

Government Exhibit No. 15 E, was a similar slip dated July 17, 1936, at 11:05 A. M.

Government No. 15 F, was a similar slip dated July 21, 1936, at 1:32 P. M.

Government No. 15 G, was a similar slip dated July 22, 1936, at 2:00 P. M.

Government No. 15 H, was a similar slip dated July 24, 1936, at 11:00 A. M.

Government No. 15 I, was a similar slip dated July 29, 1936, at 12:45 P. M.

Government No. 15 J, was a similar slip dated August 4, 1936, at 1:50 P. M.

Government No. 15 K, was a similar slip dated August 5, 1936, at 1:15 P. M.

Government No. 15 L, was a similar slip dated August 20, 1936, at 1:10 P. M.

Government No. 15 M, was a similar slip dated August 29, 1936, at 9:15 P. M.

Government No. 15 N, was a slip of the same nature dated August 31, 1936, at 11:35 A. M. (Bill of Exceptions, pages 17 and 18).

Mr. Fitzpatrick further stated that on August 4, 1936, appellant opened an account with his bank making an initial cash deposit of \$100.00 and two small checks, one in the sum of \$12.00 and the other in the sum of \$15.00.

Mr. R. B. Covington stated that during the Summer of 1936, he was employed by a real estate concern in Washington, D. C., known as Realty Associates; that he first met appellant about July 20, 1936, and submitted to him at that time a contract dated July 29, for the sale of certain property located at 2244 Cathedral Avenue, NW. This contract was introduced in evidence as Government No. 17. Covington stated that on the aforementioned date (appellant having visited the safe deposit box on that date at 12:45 p. m.) the appellant paid as a deposit \$250.00 in cash in fifty dollar bills and that the remaining cash payment of ~~\$200.00~~ ^{2,000.00} was to be made as provided for in the contract within forty-five days. As this additional payment was not made the \$250.00 was refunded on September 19, 1936. Mr. Covington also stated that the payment on the house was made on the *afternoon of the 29th at about 2:00 P. M.*, and that when the final payment was not made appellant received the \$250.00 by check (Bill of Exceptions, page 19).

Dr. Wilmer Souder, who is in charge of the handwriting identification department of the Bureau of

Standards, was qualified as an expert in disputed documents and photographs, and stated that he was shown on September 1, 1936, the various documents and photostats which had been turned over to the District Attorney's office by appellant and that he subsequently made certain tests and examinations at the Bureau of Standards with respect to these documents to determine their authenticity (Bill of Exceptions, page 37).

Dr. Souder stated that on Government Exhibit 18, the receipt for the \$1,492.50, he noticed there were evidences of erasure on certain parts of the documents above the signature "Erma Miller"; that the surface of the paper had been removed and interfered with and that there were indications of a written message which had been completely erased, but which witness was unable to restore above the signature. There were indications above the word "ninety"; that there was a double "l" or a double "f" and under the "L" in "Laughlin" there was what might have been a "B" or "8" which could be observed by using a magnifying glass and holding the document in the right position. Dr. Souder made photographic enlargements of this exhibit which, together with the exhibit in question, was shown to the jury (Bill of Exceptions, page 47).

Dr. Souder stated that the four evidences of erasure that he saw on the alleged receipt were as follows, "*I saw the general smudging of the paper in this section, then saw the destruction of the lined*

surface of the paper, then saw parts of letters remaining on there, then bumps, parts of the paper that had raised themselves up and when the light is directed from an angle they will cast shadows."

Dr. Souder further testified that there was no evidence of erasure below the signature. He further stated that he would call the document a "*rather crude forgery—it looked bad*" (Bill of Exceptions, page 48).

Dr. Souder also testified that it is *impossible for a person to write his signature twice in the same exact way* (Bill of Exceptions, page 47).

The appellant testified in his own behalf and stated that he met Johnsen, Erma Miller and Dietrich in the early part of June 1936, and that Johnsen agreed to pay him \$1,250.00 to represent the three, and an additional fee of \$250.00 to represent another co-defendant named Willie Lee (Bill of Exceptions, page 56). Appellant stated that Johnsen agreed that the five hundred dollars which was paid for cash bail for Erma Miller was to be considered as part of appellant's fee and that this sum was to be returned to appellant when her case was finally disposed of. Appellant further testified that Johnsen told him to turn the \$1,500.00 over to Erma Miller and stated to appellant that he would pay the remainder of appellant's fee from other accounts which he had (Bill of Exceptions, pages 58 and 9).

Appellant stated that on the evening of June 28, 1936, he and his wife went to a moving picture show and left his sister Gertrude in charge of his home and family; that on his return he found a message recorded by his sister to the effect that a woman named Erma Miller had personally called at his house in his absence and she was leaving for Louisville, Kentucky, the next day and wanted him to meet her at the bank so that she could obtain the money. His sister corroborated him in this respect.

Appellant stated that on the following day, June 29, 1936, that he was driven to Alexandria, Virginia, by a man named Catoe and that after he had finished his business in Alexandria, Virginia, the same Catoe drove him back to the Second National Bank, where he met Erma Miller and obtained the \$1,492.50 from the safe deposit box, paid it to her and obtained her receipt therefor (Bill of Exceptions, page 61).

Appellant contended that although on July 29, 1936, he had a signed contract for the purchase of a house at 2244 Cathedral Avenue NW., and had made a cash deposit therefor, that in reality the purchase of the house was to be a joint business enterprise between himself, his sister Gertrude, and a brother John. His sister and brother corroborated him in this connection (Bill of Exceptions, pages 67 and 68).

Appellant admitted that he had left at the District Attorney's office the alleged forged receipt

and other documents, including letters and photostats of letters and of the two receipts which Mr. Underwood testified had been left with him as Acting District Attorney (Bill of Exceptions, pages 71 and 73).

On cross examination appellant stated that the agreement with respect to the payment of \$1,500.00 as a fee for representing Johnsen and the other co-defendants was *only to include the necessary work up to the time of the return of the indictments and did not include the fee for actually defending them at their trial* (Bill of Exceptions, page 76).

Appellant also stated that the *receipts* referred to in his reply to the Grievance Committee were Government Exhibits 18 and 19; namely, the receipt for the \$1,492.50 and the receipt for \$188.00, that is, the balance of \$716.00 after the \$500.00 cash bail and incidental expenses had been paid (Bill of Exceptions, page 78).

Appellant stated that after renting the safe deposit box on June 20, the date the \$1,500 check was cashed, that he next visited the box on June 29. He further stated that in addition to the \$1,500.00 he had put in the safe deposit box also some \$600.00 which came from the Florida check and that this was the only money up to that time that he had put in the safe deposit box as far as he could recall (Bill of Exceptions, page 79). *The Florida check was not cashed until July 19th* (Bill of Exceptions, page 4).

Appellant stated that for practically a week before he replied to the Grievance Committee by let-

ter on August 25, 1936, he had before him in preparing his reply-letter, all of the vital documents in his case, including the documents which he had turned over to the District Attorney's office when questioned (Bill of Exceptions, page 80).

In connection with the alleged trip to Alexandria on June 29, when appellant contended he had been driven to that city and back by one James Catoe, appellant contended that on that date in Alexandria he had obtained a copy of a marriage license, to which marriage the said James Catoe was a party, and desired same for annulment purposes. Appellant contended that as the photostatic copy of the record he received and which he introduced in evidence bore the date *June 29th*, that this proved conclusively that this was the date which Catoe had driven him first to Alexandria and then to the Second National Bank in this city. Catoe, when called as a witness, stated on the other hand that he had *obtained his divorce decree in the District of Columbia from another wife on June 19, 1936*, and that, according to the best of his recollection, it was during the following week that he went to Alexandria with the appellant, who was his attorney. He stated he waited outside of the court house for appellant and that on his return appellant stated *that he was unable to get the record that particular day, but that he had left the necessary money with the clerk, who was going to mail the certificate to him*. Catoe stated that a few days later appellant showed him a certificate which he claimed the clerk's office had mailed him

(Bill of Exceptions, page 102). *In this connection there was a verification on the photostat of the certificate of marriage which appeared on the second page of that document, which contained the alleged date of June 29. Dr. Souder testified that he had made an examination of the entire document and that the "9" appearing in the words "June 29th", finished at the bottom with a "ball" and that the other "9's" in the entire document, including the 1936 appearing in the same verification, do not have that roll or ball at the end, showing that different type and a different machine had been used in making the one "9" appearing in the words "June 29th", in other words, this one "9" was the only one in the entire document having the ball on the end of it (Bill of Exceptions, page 114).*

One Ira N. Gullickson who stated that his occupation was that of a photographer, testified as a handwriting expert on behalf of appellant. He stated that he had examined Government 18, the forged receipt and that *he had found evidence of erasure under the body of the receipt, that is, under the writing therein (Bill of Exceptions, pages 90 and 91). The erased area he stated appeared to consist of two or three lines having been erased. Those lines were all parallel with the writing which then appeared on the receipt in question (Bill of Exceptions, page 91). The witness, however, stated that although there had been the erasures referred to, that in his opinion from the position of*

the folds in the receipt in question that it had been wrapped around some square object which would account for the dirty and abraded parts of the receipt (Bill of Exceptions, pages 92 and 93). The witness stated that the receipt showed throughout lack of and carelessness in preparation, and that in his opinion for this added reason was not a forgery (Bill of Exceptions, page 94).

ARGUMENT

I

The Government had a right not only to introduce evidence relative to the additional forgery, but to question appellant relative to it

Before going into the law applicable to what the appellant contends is his *main assignment of error*, let us first set forth what is contended in this assignment and accurately, clearly, and fully outline the facts and evidence in the case relative thereto. The assignment in question is,

The trial court erred in admitting evidence respecting an alleged forged receipt of June 15, 1936, not charged in the indictment as a forgery, the indictment charging only forgery and uttering respecting the receipt dated June 29, 1936—

The forgery count of the indictment charged that appellant "*knowingly and with intent to defraud, did falsely make and forge*" the receipt dated June 29, 1936. The uttering count of the indictment charged that appellant having posses-

sion of the said receipt, "*well knowing that the same had been falsely made and forged, knowingly and with intent to defraud, did utter to one Harry L. Underwood*" said receipt. These were the material facts which were put in issue by appellant's *plea of not guilty*, and were the necessary and material elements of the offenses which it was incumbent upon the Government to prove beyond a reasonable doubt in order to make out its case.

The record shows that on October 31, 1936, appellant personally appeared at the United States Attorney's office in this city and left with Assistant United States Attorney, Harry L. Underwood, *to substantiate his defense* as outlined in the story which he had already told United States Attorneys Garnett and Underwood, *a number of receipts and letters and certain photostats of what appellant stated were the more important ones relative to his case. Among these documents were Government Exhibits 18, 19, and 20, and certain photostats which had been made by appellant of each of these exhibits.*

Government Exhibit 18 was the alleged receipt signed by Erma Miller for \$1,492.50, dated June 29, 1936, and Government Exhibit 19, was another alleged receipt from the same Erma Miller for the sum of \$188.00 dated June 15, 1936; both receipts were in pencil writing and allegedly made out by Erma Miller, the wife of Walter C. Johnsen, and given to appellant by her on the dates designated, *for moneys which had been*

turned over by Johnsen to appellant while he was acting as attorney both for Johnsen and his wife Erma Miller and endeavoring to get both out on bond. Government Exhibit 20 was one of the letters written by Erma Miller after she had left Washington from Louisville, Kentucky, said letter having been written to appellant, and while it was undated, the first paragraph of the letter stated that it was written eight days after she had left Washington, and it was not disputed but what it was on June 30, 1936, that she left this city.

Both of these alleged receipts were in pencil and appellant stated to Assistant United States Attorney Underwood that they were genuine receipts and that they adequately and fully explained what had been done with the money Johnsen had given him.

As the record shows, the Government was able to prove that Government Exhibit 18, the receipt for the \$1,492.50 was forged by appellant *by erasing certain pencil writing in a letter he had received from Erma Miller, leaving her signature which had originally been affixed to the last line and writing over the signature the words in the body of the receipt.*

Government Exhibit 19, it was ascertained was also a forgery and was prepared by appellant *by tracing the signature of Erma Miller on the thin onion skin paper from her genuine signature affixed to a letter he had received from her*

which he had made as well (Bill of Exceptions, page 22). In this connection the record shows that appellant at first desired to leave *only the photo-stats* with Assistant United States Attorney Underwood and that it was only after a specific request that he leave the *originals* as well that he did so.

Finally, it is most important to observe that the last two questions asked appellant on direct examination by his counsel were the following:

Q. *Mr. Laughlin, you were charged in one of these indictments with forging the body of the receipt dated June 29, 1936, and introduced in evidence as Government No. 18. Are you guilty of that charge?*

A. *I am not.*

Q. *You were charged in the second count of that indictment with uttering this receipt No. 18 to Harry L. Underwood, knowing that it was a fraudulent document. Are you guilty of that charge?*

A. *I am not* (Bill of Exceptions, page 72).

By appellant's plea of not guilty he denied every material element of the forgery and uttering which was charged in the particular indictment. It is likewise evident from the questions propounded him on direct examination by his own counsel that he denied every material element and allegation of the forgery and uttering indictment and, accordingly, the Government had a right to cross examine him on all features of the case.

The testimony was first of all proper to show consciousness of guilt

It is submitted that the Government not only had a right and the burden to prove the material elements of the offenses charged, but it had a right as well to show the falsity and spuriousness of any written data which was left at the District Attorney's office by appellant, to prove his innocence just as they would have had a right to show the falsity and inconsistency of verbal statements which appellant made at the same time and place. *The government's evidence indicates that Exhibits 18 and 19 were forged and fabricated documents made by appellant relating to the same subject matter and both being presented by him as part of his defense, clearly indicated consciousness of guilt.* The authorities are unanimous that under such circumstances the Government has a right to go into the matter fully and to prove and expose the true facts. It is stated in 16 C. J. Section 1075, page 555:

Fraud on the part of accused in the preparation or presentation of his case, such as the expression, the suppression, the destruction, or the concealment of evidence, or an attempt to destroy or to suppress evidence, or to fabricate, manufacture, or procure false evidence, may be shown against him as an incriminating circumstance, inconsistent with innocence, and as tending to show

a consciousness of guilty, and that his cause lacks honesty and truth. [Italics supplied.]

It is also stated in 70 C. J. Section 944:

Fraud or Dishonesty. 'A witness may be discredited by showing that he has been guilty of fraud in connection with the subject matter of his testimony; and a party who takes the stand may be discredited by showing that he acted dishonestly in a transaction similar to that involved in the suit. [Italics supplied.]

In the case of *Wilson v. United States*, 162 U. S. 613-20-21, the court said:

Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, *but also to regard false statements in explanation or defense made or procured to be made as in themselves tending to show guilt.* The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. [Italics ours.]

B

The testimony complained of was proper to show *guilty knowledge and intent to defraud* material elements of the offense of forgery and uttering

The authorities all hold with unanimity that where *guilty knowledge and intent are material elements of the offense, and particularly in cases of fraud*, that evidence of other offenses committed at or about the same time are admissible. The authorities likewise point out that in cases where *fraud* is involved and charged, that it can usually only be proved by circumstantial evidence and that a very wide range and latitude is allowed the government in its proof and in its cross examination if the defendant takes the stand.

In 16 Corpus Juris Sec. 1163, it is stated:

Forgery.—While in prosecutions for forgery and for the cognate offenses of possessing, uttering, passing, disposing, etc., of forged instruments, evidence of other criminal acts of defendant not connected with the act charged is not admissible, *evidence of the connection of accused with other forged instruments is admissible to show intent, guilty knowledge, a general scheme or system, and motive, provided such other instruments are produced or their nonproduction is accounted for, and provided there is proof that they were forged, and that defendant's connection therewith was culpable.*

In Underhill on Criminal Evidence, Second Edition, it is stated:

SECTION 89. Evidence of other offenses to show specific intention or guilty knowledge. *Another exception to the rule occurs when the intention present in an act is material.* Thus, suppose the question is, was a given act, either by the accused, or by some other person, intentional or accidental? Here it is relevant to prove that the person whose intention is in question had performed acts of a precisely similar nature either before or after the act the intention of which is in question. And if it be found that he has performed many such acts, we have the best grounds for drawing the conclusion that the act, in the present instance, is intentional and not accidental. So where the commission of an act alleged to be a crime is admitted by the accused but he denies that he intended to commit it or alleges that he did it without guilty knowledge, his doing similar acts, wholly independent and unconnected with that under investigation is relevant to show intention.

Evidence of similar and independent crimes (but never of those which are dissimilar) is often relevant to show the presence of some specific intent. *Thus, evidence of forgeries by the accused has been received to prove the intent to defraud, which is essential in forgery; and of arson or of attempts at arson to prove that a burning was not the result of accident.* [Italics supplied.]

Likewise, in Section 423 at page 712 of the same text, it is stated:

Proof of possession and of use of forged papers, whether by the accused or by an accomplice, is admissible whether before or after the date of the alleged forgery for which the accused is upon trial. [Italics ours.]

The leading Federal case is that of *Wood v. United States*, reported in 16 Peters, 342-60, and the leading State case is *People v. Molineux*, 168 N. Y. 264-97-8, which has on a number of occasions been cited and quoted from by the Court of Appeals. In the case of *Wood v. United States*, the court said:

They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduct to establish the points in issue is necessarily embraced in it, and therefore a proper subject of proof; whether it be direct, or only presumptive. This doctrine was held in a most solemn manner in the case of the *King v. Wylee*, 4 Bos. and Pull. 92, where upon an indictment for disposing and putting away a forged bank note, knowing it to be forged, evidence was admitted of other forged notes having been uttered by the prisoner, in order to prove

his knowledge of the forgery. The same doctrine has been held in cases of the uttering of bad money and spurious notes; and also in cases of conspiracy. The same doctrine was affirmed and acted upon by this Court in the case of the United States v. Wood, 14 Peters' Rep. 430, in the case of a prosecution for perjury.

Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. [Italics supplied.]

In the case of *People v. Molineux, supra*, the court stated:

In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred

from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. *Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses.* An innocent man may, in a single instance, pass a counterfeit coin or bill. *Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent.* (*Commonwealth v. Jackson*, 132 Mass. 16, *Commonwealth v. Bigelow*, 8 Metc. 235; *Commonwealth v. Stone*, 4 Metc. 43; *Helm's Case*, 1 City Hall Rec. 46; *Smith's Case*, 1 City Hall Rec. 49; *Coffey's Cases*, 4 City Hall Rec. 52; *Dougherty's Case*, 4 City Hall Rec. 166.) So in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravaman of the offense and scienter may be proven by other previous similar acts. (*Commonwealth v. Johnson*, 133 Pa. St. 293; *Coleman v. People*, 58 N. Y. 555; *Copperman v. People*, 56 N. Y. 591; *People v. McClure*, 148 N. Y. 95.). *In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent.* (*Commonwealth v. Russell*, 156 Mass. 196; *People*

v. *Everhardt*, 104 N. Y. 591; *Reg. v. Colclough*, 15 Cox Crim. Cas. 92). On the trial of an indictment for obtaining goods by false representations, similar representations made by the defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent. (*Mayer v. People*, 80 N. Y. 364.) It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act. [Italics supplied.]

In the case of *Withaup v. United States*, 127 Fed. 530, 532, C. C. A. 8, the defendant was charged with forgery and the government was permitted to show the forgery and uttering of other documents. The opinion written by Mr. Justice Van Devanter, then circuit judge, the court said:

No error was committed in admitting in evidence the May and August vouchers and the Villa Park postal card. They were forgeries, equally with the indorsement upon the May check, because all were written after the death of the pensioner. The evidence tended to show that these forgeries, and the uttering of the forged indorsement, were connected acts in a single scheme to defraud, perpetrated by the defendant. The vouchers and the postal card were therefore admissible, not to show other offenses distinct

from those for which he was upon trial, but to prove the guilty intent and knowledge with which the principal acts charged were done. United States v. Doeblner, 25 Fed. Cas. 883, No. 14,977; Bottomley v. United States, 3 Fed. Cas. 969, No. 1,688; United States v. Hinman, 26 Fed. Cas. 324, No. 15,370; United States v. Roudenbush, 27 Fed. Cas. 902, No. 16,198; Commonwealth v. White, 145 Mass. 392, 14 N. E. 611; State v. Rose, 70 Minn. 403, 73 N. W. 177; State v. Hodges, 144 Mo. 50, 45 S. W. 1093; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; Cohen v. People, 7 Colo. 274, 3 Pac. 385; People v. Frank, 28 Cal. 507, 515. [Italics ours.]

In the case of *Dillard v. United States*, 141 Fed. 303-8, C. C. A. 9, the defendant was charged with *forgery* and the government was permitted to introduce as evidence on the *question of intent twenty seven other alleged forged and fraudulent documents not mentioned in the indictment*. In that connection the court stated:

Error is assigned to the admission of 27 other alleged forged and fraudulent certificates not mentioned in the indictment, and counsel for the plaintiff in error cite authorities which state the rule to be that evidence of the commission of other offenses not connected with the offenses charged may not be admitted against the defendant. It is true that the prosecution cannot prove against a defendant any crime not alleged in the in-

dictment, in aid, of proof that he is guilty of the crime charged. But there are certain well-recognized exceptions to the rule, and one is that evidence of other crimes is competent to prove the specific crime charged, when it tends to show the intent. It is well settled that, in cases of alleged forgery of checks and other instruments, evidence is admissible to show that, at or near the time of the execution of the instrument alleged to have been forged or uttered, the defendant forged or uttered or had in his possession similar forged instruments. Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; United States v. Snyder (C. C.) 14 Fed. 554; United States v. Kenney (C. C.) 90 Fed. 257; Packer v. United States, 106 Fed. 906, 46 C. C. A. 35; Commonwealth v. Russell, 156 Mass. 196, 30 N. E. 763. There was no error, therefore, in the admission of the other forged and fraudulent duplicate certificates. [Italics ours.]

In the case of *Pirscher v. United States*, 133 Fed. 526 (C. C. A. 5), the defendant was charged with forgery. The court held that it was proper to admit evidence of other forgeries and stated:

That no error was committed in admitting in evidence, over the objection of the defendant, the bid of Joseph Rivers, with the oath of the bidder and bond and oath of sureties thereto attached, as the same was shown by the then undisputed evidence to have been forged by the defendant contem-

poraneously with the forging of the bid by Samuel Ludgood for which the defendant was indicted. [Italics ours.]

In the case of *Bryan v. United States*, 133 Fed. 495, C. C. A. 5, *the defendant was charged with uttering counterfeit five cent pieces and the court permitted evidence to show on the question of intent that when arrested he had in his possession certain molds for the making of Twenty five cent pieces and the tool chest in which the mold was used jointly by the defendant and another person. The court said:*

That may very well be one of the grounds on which this testimony was admitted at the time it was admitted, and it may be conceded that it was in the nature of direct evidence to support that count of the indictment; but it by no means follows that, because it was in the nature of direct evidence to support one count in the indictment, it thereby had, or for any other reason shown in this record, lost its character as indirect evidence to illustrate the intent, and from which, with other circumstances, the jury could deduce the intent of the defendant in doing the acts otherwise fully established against him, charged in the counts at the conclusion of the proof was the one of fraudulent intent or not. “*And upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and*

doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for a single act taken by itself may not be decisive either way, but when taken in connection with the others of like character or nature, the intent or motive may be demonstrated with almost conclusive certainty." *Wood v. United States*, 41 U. S. 360, 10 L. Ed. 987. "*Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."* *Castle v. Bullard*, 64 U. S. 187, 16 L. Ed. 424. [Italics ours.]

In the case of *Schultz v. United States*, 200 Fed. 234-7 (C. C. A. 8), the defendant was charged with forgery and uttering, and the court held that it was proper to admit evidence of other similar offenses on the question of intent and stated:

If intent, motive, knowledge, or design be one of the elements of the crime charged, and especially if it is claimed that the crime

was committed in accordance with a system, plan, or scheme, evidence of other like conduct by the defendant at or near the time charged is admissible. Brown v. United States, 142 Fed. 1, 73, C. C. A. 187; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; Walsh v. United States, 174 Fed. 615, 98 C. C. A. 461; Ex Parte Glaser, 176 Fed. 702, 100 C. C. A. 254; Thompson v. United States, 144 Fed. 14, 75 C. C. A. 172, 7 Ann. Cas. 62. [Italics ours.]

In the case of *Wellman v. United States*, 297 Fed. 925-30, C. C. A. 6, *the defendant was charged with forgery and the government was permitted upon the question of intent to introduce evidence of prior forgeries. The court said:*

It is also claimed that these prior transactions were improperly admitted in evidence. Testimony was offered on behalf of the government tending to prove that these transactions were forgeries; that the plan of forging and uttering these counterfeit bills of lading originated with Wellman; that he had access to and did examine from day to day the record that was kept by Drueke on a separate sheet of paper of each forged and substituted bill of lading. Upon this state of the proof the testimony relating to these prior transactions was properly admitted as tending to prove criminal knowledge and intent. [Italics supplied.]

In the case of *Ex parte Schorer*, 197 Fed. 67-77, *where the defendant was charged with forgery and*

uttering, the court held that it was proper to introduce evidence of other offenses on the question of intent and guilty knowledge. The court said:

The competency of the foregoing evidence and the legitimate inference to be drawn therefrom in proof of the crimes of forgery or utterance of forged paper above specified is so clearly and unequivocally stated in numberless cases that no doubt need be entertained on the subject. The rules are recognized as exceptions to the general doctrine that the commission of one crime, cannot be proven by the commission of another. The guilty knowledge, intent, or design of the accused being in issue, collateral circumstances must, in the absence of direct proof or admissions, be resorted to to establish the same as facts. As stated by Mr. Wigmore in his work on Evidence (Vol. 1, 312), in speaking of proof of other utterings as evidence of intent, says:

“The principle here applicable proceeds merely upon the doctrine of chances. It does not attempt to show knowledge or any other possible element of intent; but it endeavors to negative inadvertence and any other innocent explanation. It argues that, the oftener a like act has been done, the less probable it is that it could have been done innocently.”

Again (section 317):

“The very kernel of the principle (either of knowledge or of intent) is that the fact of the uttering tends in one way or another

to show the defendant's knowledge at the time in issue either by the probable warning received or by the improbability of innocent intent in repeated instances; and the assumption throughout is that the bare fact of utterance tends to show this."

The following cases announce and apply the same rules: *Dillard v. United States*, 141 Fed. 308, 72 C. C. A. 451; *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *Commonwealth v. Coe*, 115 Mass. 481; *Glucksman v. Henkel*, 221 U. S. 508, 31 Sup. Ct. 704, 55 L. Ed. 830.

So, too, the rule is well settled and has been repeatedly applied that the mere possession of forged instruments raises a presumption that the party so in possession thereof either forged it or consented to the forging—

and that, in any event, the burden is cast upon one having the possession of or uttering forged instruments to give some reasonable account of his own relation thereto; and, unless he is able to do so, the inference of guilty participation or guilty knowledge must go against him. 1 Wigmore on Evidence, supra; State v. Peterson, 129 N. C. 556, 40 S. E. 9, 83 Am. St. Rep. 756; State v. Milligan, 170 Mo. 215, 70 S. W. 473; People v. Rathbun, 21 Wend. (N. Y.) 509; Hobbs v. State, 75 Atl. 1; State v. Williams, 66 Iowa, 573, 24 N. W. 52; State v. Allen, 116 Mo. 548, 22 S. W. 792. [Italics supplied.]

In the case of *United States v. Houghton*, 14 Fed. 544-7, the defendant was charged with a violation of Section 5418 of the Revised Statutes, which makes it an offense to present to any officer of the United States a forged document with intent to defraud the United States. The government in presenting its case was permitted to introduce other forged pay-rolls in order to show the fraudulent intent of the defendant. The court said:

*This knowledge of the defendant must be affirmatively shown by the government. Except in the case of confession it is generally impossible to make it out by direct evidence, and can only be inferred from overt acts. Wharton, in discussing the subject, says that if the knowledge cannot be implied from the facts and circumstances which, together with it, constitute the offense, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. It was on this principle that other pay-rolls were admitted in the case, and evidence was received tending to prove their false or fraudulent character. * * * It is admissible to prove other acts which have no connection with the principal transaction, in those cases where the knowledge or intent of the party is a material fact; as, for instance, in an indictment for knowingly uttering a forged document, proof of the possession, or of the prior or subsequent*

utterance of other false documents, though of a different description, is admitted as material to the question of guilty knowledge or intent. [Italics ours.]

In the case of *Price v. United States*, 53 D. C. App. 164-66, *the defendant was charged with uttering with intent to defraud an altered obligation and security of the United States.* The evidence indicated that the obligation in question had been altered by placing a numeral ten over the figure one, and passing it as a ten dollar bill. It was permitted to show evidence that the defendant, at the time of his arrest, had in his possession a five dollar bill from which one of the figures in the corner had been torn. The court said:

The sole remaining question necessary to be considered is whether the court committed error in permitting the introduction in evidence of the \$5 bill and the testimony concerning it; one of the corners of the bill containing a numeral 5 having been torn out. The general rule is that, upon a trial for one offense, evidence of other and wholly unconnected offenses may not be received. *But this rule is subject to certain qualifications and exceptions, to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused in the case on trial may be made to appear.* *People v. Ebanks* 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; *People v. Jennings*, 252 Ill. 534, 96 N. E.

1077, 43 L. R. A. (N. S.) 1206; *Com. v. Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; *State v. Hyde*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D 191; *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; 8 R. C. L. p. 198. The test is the relevancy of the evidence to the purpose for which its introduction is sought. In other words, the evidence as to these collateral acts must be of such a nature as to warrant the inference that there is a natural connection between the two transactions. Thus in *Homes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 37 L. Ed. 118, and in *Williamson v. United States*, 207 U. S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278 the court quoted with approval from the decision in *Stevenson v. Stewart*, 11 Pa. 307, as follows:

“The competency of a collateral fact, to be used as the basis of legitimate argument, is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. *It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.*”

In the *Holmes Case* the court said:

“The modern tendency, both of legislation and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts.”

The language was repeated in the *Stevenson Case*.

The defendant in this case professed ignorance as to the altered bill in question, so that it was highly essential to prove guilty knowledge. In a trial for receiving stolen or embezzled property, evidence of the receipt of other embezzled or stolen property of the same kind is competent to show guilty knowledge. Gassenheimer v. U. S., 26 App. D. C. 432, State v. Kelley, 65 Vt. 531, 27 Atl. 203, 36 Am. St. Rep. 884. And in Com. v. Coe, 115 Mass. 481, where the defendant was on trial for cheating by false pretenses, evidence of his possession and use of other forged certificates of stock at or about the same time was held admissible to prove guilty knowledge. The court said:

“Evidence of the possession and use of other altered and false certificates by the defendant, about the same time, whether before or afterwards, was competent to show that his possession of those, for the use of which he was indicted, was not casual and accidental.” [Italics ours.]

It is interesting to note that in the Price case Mr. Justice Van Orsdel dissented, but stated that he agreed that in cases of *forgery*, evidence of other forgeries might be admitted, and particularly evidence that similar forged instruments were found in the possession of the defendant. On this point in his dissenting opinion he stated:

Cases where a defendant is charged with forgery and similar forged instruments are found in his possession, or the charge is

passing counterfeit money and similar counterfeit money is found in defendant's possession, or cases where a defendant is charged with the commission of a crime, and evidence is offered showing that under similar circumstances he has committed a similar offense, have no analogy to this case. Since the possession of the mutilated \$5 bill was not a crime, implied no criminal knowledge or intent on the part of the defendant, but constituted a mere circumstance which, as suggested, might occur with any person having money in his possession, it was clearly inadmissible. [Italics supplied.]

The Supreme Court and the federal courts have held on numerous occasions that in cases of *fraud* and in cases involving *circumstantial evidence*, similar offenses may be introduced in evidence on the question of intent, and a very wide range and latitude is allowed the government in presenting its evidence. In the case of *Lorenz v. United States*, 24 App. D. C. 337-81, the court said:

The leading exceptions embraced in the ninth assignment of error, relating to the order of the introduction of evidence of the acts and statements of the defendants, having been heretofore considered. *Of those remaining, all that need be said is that the wide range of the evidence concerning the purchase of fasteners and the receipt and division of the money paid therefor was no*

more than has generally been permitted in all cases where fraud and conspiracy must necessarily be established by circumstantial evidence. [Italics ours.]

In the case of *Fall v. United States*, 60 App. D. C. 124-130, this court said:

The two transactions are so closely associated as to bring the admission of the testimony as to the Sinclair matter well within the rule of evidence permitting testimony of other offenses or transactions as bearing upon the motive or *intent of the accused*. The rule is well stated in *Moore v. United States*, 150 U. S. 57, 60, 14 S. Ct. 26, 37 L. Ed. 996, and quoted by Chief Justice Martin in *Eagles v. United States*, 58 App. D. C. 122, 25 F. (2d) 546, 548, as follows: "*Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.*" Such evidence may be used not only in arriving at the motive and intent of a defendant, but for establishing the constituent elements of the crime of which the defendant is accused. ~~Price~~ *PRICE* *v. United States*, 53 App. D. C. 164, 289 F. 562. [Italics ours.]

In the case of *Means v. United States*, 62 App. D. C. 118-119, the court said:

It was not error to admit competent evidence because of the fact that it incidentally revealed that appellant had a criminal record. When the tendency of testimony offered in a criminal case is to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. Moore v. United States, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996. Therefore, this contention by appellant cannot be sustained. [Italics ours.]

To the same effect see:

Castle v. Bullard, 23 How. 172-86-7.

Moore v. United States, 150 U. S. 57-60-61.

Shaw v. United States, 41 Fed. (2d) 26-27 (C. C. A. 5.).

Williamson v. United States, 207 U. S. 426-51.

Thiede v. Utah Territory, 159 U. S. 511-18.

Allis v. United States, 155 U. S. 117-19.

It was also proper on cross-examination to question appellant as to whether or not government exhibit 19 was a traced forgery, and on his denial to show that it was

It is important to bear in mind in connection with this phase of the case, that the appellant, when he took the stand, was examined and questioned *generally as to all aspects of the case* and that all documents, including government exhibits 18, 19, and 20, and photostats thereof, which were delivered by appellant to the District Attorney's office, *were put in evidence without objection*. It is likewise important to bear in mind that the last questions propounded to the appellant by his counsel were the following:

Mr. Laughlin, you were charged in one of these indictments with forging the body of the receipt dated June 29, 1936, and introduced in evidence as government No. 18. Are you guilty of that charge?—A. I am not.

You were charged in the second count of that indictment with uttering this receipt to Harry L. Underwood, knowing that it was a fraudulent document. Are you guilty of that charge?—A. I am not (Bill of Exceptions, page 72).

It is thus evident that not only did appellant put in issue the material elements of the offenses of forgery and uttering by his *plea of not guilty*, but that when he took the stand, by the broad and specific questions propounded to him, he again

brought in issue and denied in his direct examination all of the essential elements of the offenses of forgery and of uttering. The elements in question with respect to forgery were: That the appellant did not knowingly and with intent to defraud, falsely make and forge the receipt government No. 18. With respect to the uttering, the material elements of the offense which the appellant specifically denied, were that he did not utter to Harry L. Underwood the receipt in question, knowing that the same had been falsely made and forged as alleged in the first count.

The proper extent of cross-examination when a defendant takes the stand, is well stated in the case of *Raffel v. United States*, 271 U. S. 494-6-7:

The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. Reagan v. United States, 157 U. S. 301; Fitzpatrick v. United States, 178 U. S. 304; Powers v. United States, 223 U. S. 303; Caminetti v. United States, 242 U. S. 470; Gordon v. United States, 254 Fed. 53; Austin v. United States, 4 Fed. (2d) 774. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. Reagan v. United States, supra, 305; Fitzpatrick v. United States, supra; Tucker v. United States, 5 Fed. (2d) 818. He may be examined for the purpose

of impeaching his credibility. Reagan v. United States, supra, 305; Fitzpatrick v. United States, supra, 306. His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference, and the jury may be so instructed. Caminetti v. United States, supra. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.

If, therefore, the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion. [Italics ours.]

In the case of *Powers v. United States*, 223 U. S. 303-15, the court said:

Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. [Italics ours.]

In the case of *Salerno v. United States*, 61 Fed. (2d) 419-24, C. C. A. 8, the court stated:

It must also be kept in mind that it is not the specific matters which are mentioned by

the defendant in his direct testimony which determine the scope of the cross-examination, but the subject inquired about. "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject-matter inquired about." *De Witt v. Skinner*, 232 F. 443, 445 (C. C. A. 8). [Italics ours.]

In the case of *King v. United States*, 112 Fed. 988-95-6, C. C. A. 8, the court said:

In the cross-examination of witnesses in criminal cases a wide latitude is permitted. It is always permissible to show the interest, bias, and prejudice of the witness, and to inquire about any and every relevant and material matter to the issue in controversy which in any way tends to throw light upon the feelings of the witness, or explains and makes clear his situation with respect to the defendant, in order that the jury may be fully informed of all the facts and circumstances tending to throw light on the weight and importance of the evidence as given. The proposition is elementary, and it is found in the textbooks. See 1 Greenl. Ev. (15th Ed.) 684; Whart. Ev. Sec. 408, 544, 561; 1 archb. N. P. pp. 29, 30, 39. And the rule is well recognized in the decisions of the courts. See Tla-koo-yel-lee v. U. S., 167 U. S. 274, 17 Sup. Ct. 855, 42 L. Ed. 166; Taylor v. U. S., 32 C. C. A. 449, 89 Fed. 954; Tate v. State, 86 Ala. 33, 5 South, 575; Amos

v. *State*, 96 Ala. 120, 11 South. 424; *Rivers v. State*, 97 Ala. 76, 12 South. 434. [Italics ours.]

In the case of *Coca-Cola Co. v. Moore et al.*, 246 Fed. 942-3, C. C. A. 8, the court stated:

The established general rule is that the right of cross-examination is not confined to the specific questions and details of the direct examination, but extends to the subject-matter inquired about. Power v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448; Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728; De Witt v. Skinner, 146 C. C. A. 437, 232 Fed. 443. An opportunity for thorough cross-examination is especially essential in cases of expert or opinion testimony (11 R. C. L. 646). Any question is proper that fairly tends to test the accuracy of the opinion of the witness or his credibility, and in asking it the cross-examiner is not confined by the precise form or contents of the question and answer in chief. [Italics ours.]

In the case of *Asgill v. United States*, 60 Fed. (2d) 776-9, C. C. A. 4, the court stated:

Discussing the refusal of the court to require the production of certain letters above referred to for the purpose of cross-examination, counsel for the government earnestly contends that an inspection of these letters disclose that, if produced, they would only serve the purpose of showing that Alice White Allen had repeatedly said that she

was the common-law wife of James Allen, which was not disputed. *This assumes that the exploratory nature of the cross-examination must have been limited to the consideration of that fact alone. It excludes the idea that lies at the bottom of all cross-examination, to wit, that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement. [Italics ours.]*

In the case of *Barrett v. United States*, in which the defendant was charged and convicted of first degree murder, 82 Fed. (2d) 528-32, C. C. A. 7, the court said:

During the cross-examination of appellant, inquiry was permitted into the many activities in Kentucky with which appellant was connected or concerned. It must be remembered that when a defendant takes the stand he puts his veracity directly in issue, and when he relies on self-defense to the charge of murder, his character with respect to the elements which constitute murder is brought directly in issue, and under such circumstances it is quite necessary that the court permit a reasonable latitude in cross-examination with respect to matters which will reveal that character. [Italics ours.]

The Court further said, p. 533—

There is no hard and fast rule applicable to all such cases by which a trial court can

say definitely what the precise limits of cross-examination are. There are general rules which are applicable, but even these are not definite in their application to every state of facts. Of course, as a general rule, one crime cannot be proved by the proof of another, but where a defendant relies upon self-defense and testifies as a witness, the extent of the cross-examination is left largely to the sound discretion of the court, for in determining the question of malice and premeditation and the priority of aggression, the latitude of cross-examination of the defendant should be reasonably extended under a sound judicial discretion. [Italics ours.]

In the case of *Silverman v. United States*, 59 Fed. (2d) 636-39, Cert. Denied, 287 U. S. 640, the court said:

Then, too, the extent to which the government may go in a criminal case in the cross-examination of a respondent for the purpose of impeachment is largely a matter of discretion with the trial judge. We do not think there was a clear abuse of that discretion in this case. Portman v. United States (C. C. A.) 34 F. (2d) 406; Powers v. United States, 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448; Davis v. Coblens, 174 U. S. 719, 729, 19 S. Ct. 832, 43 L. Ed. 1147; Holsman v. United States (C. C. A.) 248 F. 193, 196; De Witt v. Skinner (C. C. A.) 232 F. 443. [Italics ours.]

In the case of *Bolling v. United States*, 18 Fed. (2d) 863-65, C. C. A. 4, the court said:

* * * *but in our opinion the weight of authority holds that, where the accused in a criminal trial voluntarily takes the stand, he is a witness for all purposes, and can be properly cross-examined upon all material matters connected with the particular case. He has the privilege of taking the witness stand, if he so desires, and he has the privilege, also, of not becoming a witness. His voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.* [Italics ours.]

To the same effect see also:

Brown v. Walker, 161 U. S. 591-97.

Alford v. United States, 282 U. S. 687-91.

Agnew v. United States, 165 U. S. 36-47.

Tla-Koo-Yel-Lee v. United States, 167 U. S. 274-7.

Washington & O. D. Ry. Co. v. Smith, 53 App. D. C. 184-89.

Litsinger v. United States, 44 Fed. (2d) 45-7, C. C. A. 7.

While the authorities hold, as we have already pointed out, that other offenses may be shown on the question of intent and guilty knowledge, the authorities all hold and insist that the government prove that, in fact, *the other offenses were actually committed. It was, therefore, necessary for the government to actually prove that government*

exhibit 19 was a traced forgery. The leading case in this jurisdiction is that of *Gassenheimer v. United States*, 26 App. D. C. 432-3. The defendant in that case was charged and convicted of the offense of receiving embezzled goods knowing them to have been embezzled. *Evidence of other embezzled property at or about the same time was offered as circumstances tending to show guilty knowledge.* The defendant appealed and admitted that it was proper to introduce such evidence, but contended that it was necessary for the government to actually prove that the defendant was aware of these facts. The court reversed the case because the government did not prove these additional essential facts, and stated, p. 443:

Proof of guilty knowledge at the time of the receipt of the property of which is accused cannot be supplied or aided by proof of the receipt or possession of other like property not shown to have been embezzled also. Gassenheimer v. State, 52 Ala. 313, 318; State v. Saunders, 68 Iowa, 370, 27 N. W. 455; State v. Prins, 113 Iowa, 72, 75, 84 N. W. 980; Harwell v. State, 22 Tex. App. 251, 253, 2 S. W. 606. [Italics ours.]

D

The order of testimony and proof is discretionary with the trial judge

The Government contends now as it did in the court below that it was proper to have gone into the matter of the additional forgery (Government

Exhibit 19) *both during the case in chief and during the cross-examination of appellant when he took the stand in his own behalf.* The court below disagreed with the Government's contention and out of an abundance of caution did not permit the Government to go into the matter of the additional forgery until appellant had taken the stand and been questioned *generally and fully by his counsel on the matter of the forgery and uttering of Government Exhibit 18 and had been cross-examined without objection as to what he knew in detail concerning both Government Exhibits 18 and 19.* As to questions asked on cross-examination without objection as to Government Exhibit 19, see Bill of Exceptions, pages 73, 75, and 78.

We have already stated that Government's Exhibits 18, 19, and 20 and photostats thereof, all of which were turned over by appellant to the District Attorney to prove his innocence, *were admitted in evidence without objection.* On cross-examination, *without objection, appellant stated that Erma Miller gave him both receipts, Government's Exhibits 18 and 19.* With respect to Government's Exhibit 19, *he stated that he had seen her sign that document and that he or no one else for him placed her signature thereon* (Bill of Exceptions, pages 73, 75, and 78). As we have already stated, Erma Miller denied while on the stand that she had ever signed either of the receipts.

The Court, at page 112 of the Bill of Exceptions, explains fully and clearly why he permitted the

questioning with respect to Government's Exhibit 19 during the cross-examination of appellant. The record therein is as follows:

The COURT. The motion is overruled, and I will state that when the question of Exhibit 19 was up before the question was whether or not he would be permitted to establish whether or not the defendant had committed some other crime, or committed forgery at another time than these forgeries charged in this case. Those papers are in, and I do not think it is an attempt to prove by indirection what cannot be proved directly. *The defendant handed these papers over to the District Attorney as an indication that he did not do the thing he was charged with doing by Johnsen. On the stand Erma Miller was asked if she signed Exhibit 19. She said she didn't sign it. When the defendant was on the stand he was asked whether or not he wrote the body of the receipt and he said that he did, and he was asked how did Erma Miller's name get there, and he said, in substance, that it was put there, and then the question was put more directly and he testified that Erma put it there but that he did not put it there. I think this affects his credibility as a witness, and it shows that these enlargements you are talking about are enlargements of both of those instruments.*

After cross-examination was permitted with respect to the additional forged document Government Exhibit 19 which counsel had turned over to

the Government with Government Exhibit 18, the forgery mentioned in the case on trial as a part of his defense. Government was then permitted in rebuttal to call Dr. Souder, its handwriting expert, and prove Government Exhibit 19 was also a traced forgery.

The record shows that as soon as Dr. Souder's testimony had been introduced, *Court was adjourned at an early hour, namely 2:26 P. M. at the request of counsel for the appellant so that he might consider overnight whether he would call any additional witnesses before resting his case* (Bill of Exceptions, page 115).

The following morning, the following occurred:

Mr. FIHELLY. I understand you are resting, Mr. Horning.

Mr. HORNING. Yes, sir.

Mr. FIHELLY. *The Court gave you until this morning to see if you wanted to put in any additional evidence.*

Mr. HORNING. *That is right. The defendant rests.*

Mr. FIHELLY. We have no further evidence. The Government rests. May we proceed then with the argument, Your Honor.

The COURT. Yes; sir (Bill of Exceptions, p. 115).

It is elementary that *the order of testimony and proof is discretionary with the trial justice*. In the case of *Goldsby v. United States*, 160 U. S. 70-74, the court said: .

The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. *This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here.* *Wood v. United States*, 16 Pet. 342, 361; *Johnston v. Jones*, 1 Black 209, 227; *Commonwealth v. Moulton*, 4 Gray 39; *Commonwealth v. Dam*, 107 Mass. 210; *Commonwealth v. Meaney*, 151 Mass. 55; *Gaines v. Commonwealth*, 50 Penn. St. 319; *Leighton v. People*, 88 N. Y. 117; *People v. Wilson*, 55 Michigan 506, 516; *Webb v. State*, 29 Ohio St. 351; Wharton's Criminal Pleading and Practice, Sec. 566; 1 Thompson on Trials, Sec. 346, and authorities there cited.

Cases which hold likewise are: *Miller v. United States*, 21 Fed. (2d) 32, C. C. A. 8; *Mason & Hanger v. Sharon*, 231 Fed. 861, C. C. A. 8; *Mears v. United States*, 60 D. C. 387-8, and *Murray v. United States*, 53 D. C. 119-24.

II

The court did not err in refusing to permit appellant's counsel to show that certain Government witnesses had admitted to appellant as their attorney that they were guilty of offenses on which they had been indicted and were awaiting trial

Walter C. Johnsen was the first Government witness. *As the record shows, he had been indicted in another case with Erma Miller, Edward Dietrich, Willie Lee, and a man named Bodkin. Certain motions were pending in these cases to suppress evidence allegedly unlawfully seized and thus the cases in question had not actually been tried at the time of appellant's trial. The record also shows that, in connection with the matter of bail and certain preliminary matters prior to the actual trial of their cases, appellant was representing the aforesaid co-defendants with the exception of Bodkin who had not been apprehended and was without the jurisdiction of the Court.*

As part of the cross-examination, appellant's counsel attempted to run a red-herring across the trail and to ask questions which would have elicited information *proving the guilt of Johnsen, Dietrich, and Miller in cases in which they had been indicted but which had absolutely no probative or evidentiary value in the case on which appellant was being tried.*

At the outset the Government objected to this line of questioning because it was immaterial and irrelevant and counsel for appellant, seeing that

the Court was going to sustain the objection, *at once withdrew the question.*

The matter arose at the outset of Johnsen's cross-examination when appellant's counsel asked the following question which was objected to.

Q. I will ask you if it isn't a fact that in connection with your case in the evidence which Mr. Laughlin would have to meet, you told him that the method of operation of your persons would be to open an account at a bank—

Question was then objected to and the Court called respective counsel to the bench (Bill of Exceptions, p. 6). At the bench, the Court informed counsel that he did not feel the pending question was a proper one and indicated that he was going to sustain the objection made to the pending question. Appellant's counsel then stated (Bill of Exceptions p. 8):

I will withdraw it. I won't proceed with it.

On return to the trial table, Government counsel stated:

The pending question, as I understand it, has been withdrawn.

Appellant's counsel, Mr. Horning, then stated:

"It has been withdrawn; yes, that is correct" (Bill of Exceptions p. 8).

Shortly thereafter appellant's counsel returned to the same general line of questioning. He asked certain questions about one *Bodkin* whose name

had not even been mentioned during the direct examination, who was a co-defendant, as has been stated, with Johnsen in his case which was not then on trial and this line of questioning was again objected to (Bill of Exceptions, pp. 8 and 9).

At the bench Government counsel informed the Court that Bodkin was a co-defendant with Johnsen in the other cases. Appellant's counsel informed the Court that this was the first that he knew of the fact that Bodkin was a co-defendant.

The Court then stated to appellant's counsel:

No; what you want is to get before this jury not to discredit what this man says but that he has a record all over the country, that there are detainers, that he is wanted everywhere and I shall tell the jury detainers don't mean anything. If you have got one offense against him——

Mr. HORNING. If your Honor will look at this letter, you will see the purpose of my question.

The COURT. Who wrote the letter?

Mr. HORNING. Laughlin by special delivery to him. We will expect at the proper time I will prove of the delivery of it to him at the jail.

The COURT. *Well suppose that it did. You ask him a question if he remembers anything that a man said to him. Now to refresh his recollection or to discredit him in some way you ask him whether he talked to him about a great many other things. That does not go to the man's credibility. That is*

to get before the jury that the man is charged with crime everywhere else in the country (Bill of Exceptions, p. 10).

The record shows that from that time on counsel did not again indulge in this line of questioning. As in the first instance where the specific question elicited to show the guilt of Johnsen and the other co-defendants in their individual cases was withdrawn, so in the second instance with respect to the co-defendant Bodkin, the matter was not pressed further by appellant's counsel. No exception was taken; no detailed offer of proof as the law requires was made by appellant and his counsel peacefully acquiesced in the ruling of the Court that the particular line of questioning was improper, irrelevant, and immaterial.

That the Court's ruling on this point was based primarily on the fact that the evidence sought to be adduced was *irrelevant and immaterial* can be seen from the different colloquies between the Court and the appellant's counsel set forth in the record. A typical one is found at page 55 of the Bill of Exceptions:

MR. HORNING. As I understand Your Honor's ruling, I should make to you a proffer of going into the whole conversation which was had at the Jail with him on that occasion, and I understood that you were going to limit it so as not to bring up anything that pertained to——

THE COURT. Not bring up anything that would be a violation of professional confi-

dences, *that the man would say that these men told him they committed this crime or that crime or any crime. So far as your case is concerned, I should think it would be immaterial what they told him about their trouble in this case.*

Mr. HORNING. *Yes. I will limit it directly to that.*

The record also shows that not only was appellant's counsel not permitted to go into these irrelevant matters, but the appellee at no time attempted to do so. For example, it is stated on page 36 of the Bill of Exceptions:

Mr. FIELLY. *Of course, if your Honor please, Mr. Horning knows we kept out of the other cases. There were certain things said with respect to the other cases. In view of His Honor's ruling, I have not gone into that at all.*

Mr. HORNING. *Oh, yes; and I am not going into that.*

So we find the appellant setting forth as one of his assignments of error matters to which he not only did *not properly object and note an exception to but actually withdrew from the consideration of the Court.*

In the case of *Alexander v. United States*, 138 U. S. 353-55, the Court said:

It is the duty of counsel seasonably to call the attention of the court to any error in impanelling the jury, in admitting testimony, or in any other proceeding during the

trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception. Stoddard v. Chambers, 2 How. 284; DeSobry v. Nicholson, 3 Wall. 420; Canal Street Railroad v. Hart, 114 U. S. 654; Thompson on Trials, Sections 690, 693, 700.

In the case of *Lewis v. United States*, 146 U. S. 370-79, the court said:

The only other error assigned which called for notice is the one objecting to the language used by the court when cautioning the jury in respect to the testimony bearing on the defense of an alibi. Whether the language of the learned judge went beyond the verge of propriety, we are not called upon to consider, as no due exception was taken at the trial, and no opportunity was, therefore, given the court to modify the charge.

Appellant cites certain cases under this particular assignment of error which are in no-wise in point. None of the cases in question hold or indicate that where Johnsen and his co-defendants Dietrich and Miller were called as witnesses in another case with entirely different issues involved and were not on trial themselves that it was proper cross-examination for counsel to show that they had admitted to appellant as their attorney the fact that they were guilty of the offenses for which they had been indicted in another case and were then awaiting trial.

In the cases cited, it will be seen that the issues in question were clear-cut and direct and the evi-

dence was relevant and material to those issues. Obviously an entirely different situation prevailed in the instant case.

III

Counsel consented to the trial proceeding with a jury of less than twelve

Counsel contends that he was tried by what he terms "an unconstitutional jury of only ten jurors." The facts will show that he consented to the trial continuing with a jury of less than twelve men and that under the authority of Patton, 281 U. S. 276, he waived whatever rights he had to be tried by a jury of twelve. The Bill of Exceptions, pp. 33-4 shows that the following occurred:

On Monday, January 18, 1937, when the trial was resumed, it was found that one juror was sick. The Court asked counsel whether they desired or were willing to proceed with the eleven jurors. Government counsel stated he was willing to proceed with the eleven jurors. Appellant's counsel replied that he was not willing to do so "*at this time*" and asked that the Court determine the real extent of the illness of the juror in question and the probability as to when he could return. The Court then stated: "I will continue this case over until tomorrow unless you would just as soon go on with eleven jurors or go on tomorrow with eleven jurors. I would like for the clerk to telephone the man's wife and Doctor and you be present when he does that *and you make up your mind*

whether you will go on with eleven jurors tomorrow." Court was then adjourned until the following morning (Bill of Exceptions p. 34).

The following morning it was found that an additional juror was sick and the Bill of Exceptions, p. 34, shows that the following occurred following a conference at the Bench at which time appellant's counsel had informed the court he was ready to proceed with ten jurors.

The COURT. *Mr. Clerk, what is the situation with respect to the jurors?*

The CLERK. *There are two jurors absent, your Honor, and one of them will probably be able to be here Monday and the other Friday."*

The COURT. *Are counsel for the Government and the defense ready and willing to proceed?*

Mr. FIELLY. *Both ready if your Honor please, I understand.*

The COURT. *With the case, with the two absent jurors?*

Mr. HORNING. *Yes, sir; we are ready on behalf of the defendant.*

The COURT. *And the defendant is willing to?*

Mr. HORNING. *Yes, sir; perfectly willing.*

So we have here in brief a situation where Court was adjourned because of the illness of one juror, counsel for appellant stating that at that particular time he did not desire to proceed, the Court adjourning until the following day in order to deter-

mine the extent of the juror's illness and *the Court requesting appellant's counsel to decide and determine by the following morning in the event of the juror's continued absence whether he would go ahead with a jury of eleven.* We have counsel for appellant the following morning stating that not only was he willing to go ahead with the jury of eleven but in view of the conditions then existing *it was agreeable to him to proceed with a jury of ten.* The record specifically shows that to this not only the Court and the District Attorney agreed, *but appellant himself as well.* Clearly the appellant waived whatever rights he had to be tried by a jury of twelve and the record shows that all of his legal and constitutional rights were afforded him in the manner in which he acquiesced and consented to proceed with the jury of ten. *Patton v. United States, supra.*

IV

There was no impropriety or error in counsel conferring with the court out of the presence of the jury

Many of the assignments of error set forth are of such a *picayune nature as to show that appellant is merely grasping at straws.* There perhaps never was a criminal or civil case tried in which there did not come a time when the Court would confer with counsel out of the presence of the jury on certain matters of law and procedure which had arisen. In a criminal case *especially* this is done

and in the instant case it was done *for the benefit and protection of the party on trial*. Many matters arise during the trial of a criminal case which, if they are gone into *precipitously, would jeopardize the rights and cause of the party on trial or bring about the withdrawal of the juror and a mistrial*. The instant case took some two weeks to try and, as in any other case of such a nature, points of law arose which the Court discussed with counsel at the bench. The record shows that in the majority of these instances *appellant's counsel himself asked to approach the bench*. No exception of any kind at any stage of the case was asked on this particular ground. It was not mentioned in the motion for new trial which was filed, but it is thrown in now at the last moment with other alleged assignments of error of a nebulous nature in appellant's desperation.

V

The stipulation entered into between counsel with respect to the testimony of appellant's wife and daughter was entirely proper

Appellant while on the stand testified that when he returned to Washington on or about July 25, 1936, having been out of the city for a short time, he found that some ink had been spilled on certain of the documents he had in his possession relating to this case. It was his contention that the ink had not been spilled there by him but by one of his children while he was away from the city. Ap-

pellant apparently was going to call his wife and daughter to show this particular fact. The Government frankly stated to the Court and to appellant's attorney that they were not in a position to rebut this allegation and could produce no evidence or testimony to show how the ink got on the papers in question. The Court then suggested: "*Can't you stipulate that they would testify if called?*"

Mr. HORNING. *Yes, we will do that.* (Bill of exceptions, p. 101.)

Subsequently, the Bill of Exceptions, pp. 102-3 shows that the following occurred:

Mr. HORNING. *I understand that we have stipulated that the defendant's wife and daughter who are here, if called as witnesses, would testify that ink was spilled on or about Sunday, July 25, 1936, by Mr. Laughlin's little two year old boy; that at that time the ink bottle was in the desk and the little fellow climbed up and spilled the ink over papers that were in the desk.*

The COURT. No particular papers?

Mr. FIHELLY. No, just general papers that were in the desk.

Mr. HORNING. Just papers and that the wife spread the papers out and let them dry.

The COURT. But she didn't know what papers they were?

Mr. FIHELLY. No.

Mr. HORNING. It was papers and, of course, the defendant has testified to those.

The COURT. Very well.

Accordingly, we have a matter of trivial importance which arose during the trial which *counsel for appellant agreed to stipulate on and did stipulate on*. How this is reversal error is not clear *nor does appellant's brief even attempt to make it clear*.

Appellant in his brief merely passes the matter off by saying: "*This matter will be treated further in a supplementary or reply brief.*" The Government does not understand that this is the proper function of a supplementary or reply brief, in other words, *in fairness to the Court and to the Government, if appellant has anything to say as to this particular assignment of error, it should have appeared in his original brief so that the appellee might reply to same in its brief.*

VI

On the entire record under the provisions of Section 269 of the Judicial Code, Title 28, U. S. C. A., Section 391, the judgment of the lower court should be affirmed

Section 269 of the Judicial Code, Title 28, U. S. C. A., Section 391, provides that "*on the hearing of any motion for a new trial in any criminal case, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.*" [Italics ours.]

The evidence in this case *overwhelmingly* shows the guilt of appellant and this is indeed a typical

case to which the aforementioned statute is applicable.

In the case of *Borum v. United States*, 61 D. C. App. 4-7, a first degree murder case, the Court of Appeals stated:

“As the Supreme Court said in Williamson v. U. S., 207 U. S. 425, 451, 28 S. Ct. 163, 172, 52 L. Ed. 278: The modern tendency both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.” [Italics ours.]

It is accordingly contended that the judgment of the lower court should be affirmed.

Respectfully submitted.

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